

STATE OF MICHIGAN
COURT OF APPEALS

MARY TURK and DOROTHY STONER,

Plaintiffs-Appellants,

v

WINONA DULA,

Defendant-Appellee.

UNPUBLISHED

April 10, 2007

No. 273424

Jackson Circuit Court

LC No. 03-001875-NI

Before: Neff, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

I. Introduction

Plaintiffs appeal as of right the trial court’s July 27, 2007, opinion and order granting defendant’s motion to withdraw her admissions and granting summary disposition in her favor. On appeal, plaintiffs argue that the trial court abused its discretion when it granted defendant’s motion to withdraw her admissions. Furthermore, plaintiffs argue that the evidence presented established that they both suffered a “serious impairment of body function,” and accordingly, the trial court erred when it granted summary disposition in favor of defendant. We disagree with plaintiffs’ arguments and affirm the trial court’s July 27, 2006, opinion and order.

II. Facts and Proceedings

On April 19, 2001, plaintiffs Mary Turk and Dorothy Stoner were on their daily walk near the Windham Hills Mobile Home Park when a vehicle being driven by defendant at a low speed struck them from behind. Immediately after the accident, Turk drove herself to Foote Hospital where she was diagnosed with a lumbar strain and contusion, as well as superficial abrasions. Turk was given some Motrin and released. After the paramedics put a neck brace on Stoner and put her on a backboard, they transported her to the hospital. The emergency room doctors took x-rays of Stoner and diagnosed her with a “mild compression fracture, T11, age undetermined[,]” scrapes and bruises. The emergency room records also revealed that Stoner, who was 81 years old at the time of the accident, had a degenerative joint disease and a history of compression fractures. Stoner was given Motrin for her pain and was released.

A couple of days after the accident, Turk visited her primary doctor, Dr. Jones (Jones), who took an MRI, which revealed a bulging disc, mild spinal stenosis and degenerative changes. Jones prescribed Motrin, recommended physical therapy for Turk’s neck, and referred Turk to

neurologists, Dr. Wald, Dr. Rawal and Dr. Mahmoud. Mahmoud diagnosed Turk and stated that her range of neck motion was normal. Mahmoud stated that Turk had mild cervical spondylosis and degenerative changes. Turk attended physical therapy three times a week for approximately six weeks. A couple of weeks after the accident, Turk began seeing her chiropractor, Dr. Mayo, regarding neck pain and arm numbness.¹ At the time of Turk's deposition, she was still seeing Mayo for spinal adjustments.

Turk stated that she still has neck and back pain, which she alleviates by taking Advil. Turk further stated that she has trouble lifting heavy objects, traveling, vacuuming and gardening. However, Turk returned to her job as a night chef at Old Country Buffet a couple of days after the accident and stated that she still vacuums and gardens. Furthermore, Turk still takes long trips to the Upper Peninsula to visit her daughter, more frequently than she did before the accident. Turk resumed her daily walks with Stoner in January 2002, and stated that it does not bother her to walk. Turk was never told by any of her doctors to restrict any of her activities.

Shortly after the accident, Stoner saw Dr. Beredo because her primary doctor, Dr. Edurese, was on vacation. Beredo diagnosed Stoner with a lumbo sacral strain. Stoner eventually treated with Edurese on May 4, 2001, who referred her to Dr. Medlar for an orthopedic consultation. Stoner was not told to restrict any of her activities. Stoner met with Medlar on May 17, 2001, regarding pain in her left knee, but his records indicate that Stoner did not complain of pain in her left shoulder until her November 23, 2001, visit. On the November 23, 2001, visit, Medlar diagnosed Stoner with degenerative arthritis in her left shoulder, and stated that the arthritis was aggravated by the accident. Medlar gave Stoner a cortisone shot and set up a physical therapy plan. Stoner successfully completed her physical therapy. On April 23, 2002, Stoner stated that she was ready for knee surgery because the pain in her knee had become unbearable and was aggravated by any activity. Stoner had total knee replacement surgery on May 20, 2002.² Stoner completed more physical therapy sessions after her knee surgery, and on August 20, 2002, Medlar noted that Stoner's "knee [was] doing fine."³ On February 23, 2003, Stoner still complained of severe pain in her left shoulder, which Medlar believed was due to degenerative arthritis. Stoner finally had surgery on her left shoulder on May 10, 2004.

Stoner, who had a weekend job displaying samples at Meijer prior to the accident, attempted to go back to work shortly after the accident, but was in such agony at the end of her first day back at work that she quit her job. Although Stoner resumed her daily walks in January

¹ Turk stated that she had also seen Mayo on several occasions approximately a year or two before the accident in question. Furthermore, Mayo's records establish that Turk visited him on a consistent basis throughout 1997 to 2000 regarding neck pain, back pain and arm numbness.

² Stoner was not discharged until May 23, 2002, because the surgery caused hyponatremia.

³ Although Stoner stated that she never had problems with her left knee prior to the accident, Medlar's records indicate that Stoner had a long history of problems with her knees dating back to 1985. In particular, when Stoner visited Medlar on October 10, 2000, and March 29, 2001, she complained of increasing discomfort in her left leg that made it difficult for her to walk, and she was seriously contemplating having complete knee replacement surgery.

2002, and continues to do household chores, including ironing, vacuuming, laundry and grocery shopping, she stated that the tasks have become more difficult because they cause her back pain. Stoner admitted that she had aches and pains before the accident.

On March 14, 2003, plaintiffs filed a complaint alleging that defendant negligently hit them with her vehicle and caused each of them injuries that constituted a serious impairment of body function under MCL 500.3135(7). On June 13, 2003, plaintiffs served defendant with a request for admissions, which asked defendant to admit that she had been negligent and caused plaintiffs' respective threshold injuries under MCL 500.3135(7). Thirty-eight days later, on July 21, 2003, defendant responded to plaintiffs' request, admitting that she was negligent in the operation of her motor vehicle, but further stating that she could neither admit nor deny that she caused plaintiffs' alleged injuries or that plaintiffs' alleged injuries constituted serious impairments of body function.

On February 13, 2004, defendant filed a motion for summary disposition stating that summary disposition should be granted in her favor because neither plaintiff had suffered a serious impairment of body function. On February 27, 2004, plaintiffs filed a response to defendant's motion for summary disposition and their counter-motion for summary disposition. Plaintiffs argued that defendant's motion for summary disposition should be denied because there were genuine issues of material fact regarding whether they both suffered a serious impairment of body function. Plaintiffs further argued that summary disposition should be granted in their favor because defendant's untimely response to their request for admissions amounted to affirmative admissions that she caused plaintiffs' injuries, and that each of plaintiffs' injuries constituted a serious impairment of body function. After hearing the parties' arguments, the trial court issued an opinion and order on May 27, 2004. Without addressing plaintiffs' untimely response argument, the trial court granted defendant's motion for summary disposition "as to each plaintiff," finding that plaintiff Stoner had not established an objectively manifested impairment as a result of the accident, while plaintiff Turk had not sustained any of her alleged injuries because of the accident. The trial court thus granted defendant's motion because "neither plaintiff suffered injuries that constituted a serious impairment of body function affecting her general ability to lead her normal life as required by statute."

On June 17, 2004, plaintiffs appealed as of right from the trial court's May 27, 2004, opinion and order. Plaintiffs argued that the trial court erred when it ignored their untimely response argument, and in turn, essentially ignored defendant's admission that plaintiffs' injuries met the serious impairment threshold of the no-fault act. A panel of this Court found that pursuant to MCR 2.312(B)(1), defendant admitted that plaintiffs' injuries met the serious impairment threshold when she failed to timely respond to plaintiffs' request for admissions. *Turk and Stoner v Dula*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 2006 (Docket No. 256259). The panel further noted that a "matter admitted under [MCR 2.312] is conclusively established unless the court on motion permits withdrawal or amendment of an admission." *Id.* Accordingly, the panel reversed the trial court's May 27, 2004, opinion and order, and remanded the case to the trial court so that the trial court could determine whether it would be proper to set aside defendant's admissions. *Id.*

On April 3, 2006, plaintiffs filed a motion for entry of order granting them summary disposition and setting the matter for trial. On April 19, 2006, defendant filed a motion to set aside her admissions and to affirm the trial court's May 27, 2004, order granting defendant's

motion for summary disposition. On May 30, 2006, plaintiffs filed an answer to defendant's motion to withdraw her admissions, arguing that defendant's motion to withdraw her admissions should be denied because it was not filed "within a reasonable time," defendant failed to show "good cause" to withdraw her admissions, and because plaintiffs would be prejudiced if defendant was allowed to withdraw her admissions and amend her answers.

After hearing the parties' arguments on June 2, 2006, the trial court issued an opinion and order on July 27, 2006. The trial court found that defendant's delay in responding to plaintiffs' request for admissions was inadvertent and justified by good cause, refusal of defendant's request to set aside her admissions would eliminate the trial on the merits, and granting defendant's request would not prejudice plaintiff:

This Court is satisfied that to refuse Defendant's oral request at the time of the motion hearing and now the written motion of Defendant to set aside the late responses would only serve to eliminate a trial on the merits or the major issues of liability would be resolved in their entirety and only the issue of damages would be left for the trier of fact. The Plaintiffs would not appear to be prejudiced as full discovery has been conducted and the case submitted to case evaluation with the case evaluation findings having been submitted to each of the parties. The Court is also satisfied that the delay was inadvertent by the Defendant and the answers were only late by [ten] days and did proceed the discovery in this matter. The Court is additionally satisfied that the Defendant has shown good cause for the lateness of the answers[.]

Accordingly, the trial court granted defendant's motion to withdraw her admissions, and subsequently granted defendant's "original Motion for Summary Disposition dismissing this case." On August 10, 2006, plaintiffs filed a motion for reconsideration, which the trial court denied by order on September 8, 2006. Plaintiffs appeal as of right.

III. Standard of Review

We review a trial court's decision to grant or deny a motion for summary disposition *de novo*. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Our review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). However, we may not make factual findings or weigh the credibility of witnesses. *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Moreover, we review a trial court's decision concerning the amendment or withdrawal of an admission for an abuse of discretion. *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). An abuse of discretion standard "acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and

principled outcome.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). If the trial court selects one of these principle outcomes, “the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment.” *Id.*

IV. Analysis

A. Motion to Withdraw Admissions

Under MCR 2.312(B)(1),⁴ “[e]ach matter as to which a request is made is deemed admitted unless, within 28 days after service of the request . . . the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter.” Here, defendant failed to respond to plaintiffs’ request for admissions until 38 days after the request. Defendant therefore admitted that she caused plaintiffs’ injuries, and that each of plaintiffs’ injuries constituted a serious impairment of body function. MCR 2.312(B)(1). However, pursuant to MCR 2.312(D)(1), a defendant’s failure to properly answer a request for admissions does not mean that the trial judge must automatically enter summary disposition - even if the admissions cover the entire suit - because the trial judge has the discretion to allow the party to file late answers, or even to amend or withdraw their admissions. *Jancyk v Davis*, 125 Mich App 683, 691; 337 NW2d 272 (1983).

On motion, a trial court “may allow a party to amend or withdraw an admission” for good cause if amendment or withdrawal of the admission is just. MCR 2.312(D)(1); *Employers Mutual Gas Casualty Co v Petroleum Equipment, Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). “Requests and responses under [MCR 2.312] must be filed with the court either before service or within a reasonable time thereafter.” MCR 2.312(F). If a request to withdraw is made within a reasonable time, the court then must determine whether to allow the party to withdraw an admission and file a late answer, and when doing so needs to balance three factors; (1) whether denying the motion will eliminate the trial on the merits; (2) whether the non-moving party would be prejudiced if the moving party was allowed to withdraw an admission and file a late answer; and (3) whether the moving party’s delay in answering the non-moving party’s request for admissions was inadvertent. *Jancyk, supra* at 692-693.

Here, defendant did not respond to plaintiffs’ request for admissions until July 21, 2003, and did not informally request to withdraw her admissions until March 5, 2004.⁵ However, the

⁴ MCR 2.312 is modeled after FR Civ P 36, and serves two vital purposes; (1) to facilitate proof with respect to issues that cannot be eliminated from the case; and (2) to narrow the issues by eliminating those that can be eliminated. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 419-420; 551 NW2d 698 (1996).

⁵ We acknowledge that defendant did not file a formal motion to withdraw her admissions until April 19, 2006. However, in the prior appeal, this Court remanded to the trial court the issue of whether defendant could withdraw her admissions:

Assuming defendant’s comments at constituted a motion [to withdraw admissions] under MCR 2.312(D)(1), the court never addressed or granted withdrawal or amendment. . . . We decline both parties’ invitations to address

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discovery process proceeded normally after defendant's 10-day late answer to plaintiffs' request for admissions. Furthermore, case evaluation took place on January 8, 2004, without any reference to the fact that defendant had made certain admissions pursuant to MCR 2.312(B)(1). In fact, plaintiffs did not bring up defendant's admissions pursuant to MCR 2.312(B)(1) until they filed their response to defendant's motion for summary disposition and counter-motion for summary disposition on February 27, 2004. Therefore, defendant made a request in the spirit of MCR 2.312(F) to set aside her admissions shortly after she was made aware of the fact that her responses to plaintiffs' request for admissions were filed late. Accordingly, under the circumstances of this case, for purposes of MCR 2.312(F), the trial court's conclusion that defendant's request to withdraw her admissions was made "within a reasonable time," was a reasonable and principled outcome. Furthermore, there is no reason for us to believe that defense counsel was not telling the truth when she stated that she was not aware that defendant's answer to plaintiffs' request for admission was filed in an untimely manner. Accordingly, we also find that the trial court's conclusion that defendant's delay in answering plaintiffs' request for admissions was inadvertent, was a reasonable and principled outcome.

Finally, plaintiffs' argument that they would be prejudiced if defendant was allowed to withdraw her admissions, because plaintiffs relied on her admissions when deciding what discovery to conduct, is not supported by the record. The record establishes that both parties had full access to all of plaintiffs' medical records, both plaintiffs gave depositions at their attorney's request, which both extensively addressed their respective injuries, the medical treatment they sought for their respective alleged injuries, and the impact the respective alleged injuries had on their general ability to lead their normal pre-accident lives. Additionally, plaintiffs do not dispute defendant's statements that during case evaluation, the only issue that was argued by both parties was whether plaintiffs' alleged injuries constituted threshold injuries. The fact of the matter is that defendant's answers to plaintiffs' request for admissions were only ten days late; full discovery was subsequently conducted by both parties in its normal course; and the case was submitted to case evaluation. Accordingly, we find that the trial court's conclusion that plaintiffs would not be prejudiced if defendant was allowed to withdraw her admissions, was a reasonable and principled outcome. Therefore, we conclude that the trial court did not abuse its discretion when it granted defendant's motion to withdraw her admissions. MCR 2.312(D)(1); *Babcock*, *supra* at 269; *Jancyk*, *supra* at 692-693.

B. Serious Impairment of Body Function

It is the duty of the courts to give effect to the intention of the Legislature in passing its enactments. The general purpose of the no-fault insurance act was to partially abolish tort remedies for injuries sustained in motor vehicle accidents and to substitute first-party insurance benefits in the place of tort remedies. *Stephens v Dixon*, 449 Mich 531, 541; 536 NW2d 755 (1995). Under the no-fault insurance act, a person remains subject to tort liability for non-

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whether it would have been proper to set aside the admissions under the circumstances. Such a determination should be made by the circuit court in the first instance. [*Turk and Stoner v Dula*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 2006 (Docket No. 256259).]

economic loss caused by his ownership, maintenance, or use of a motor vehicle only if the injured person suffered death, serious impairment of body function, or permanent serious disfigurement. *Id.* at 539; MCL 500.3135(1).

A “serious impairment of body function” is defined as an objectively manifested impairment of an important body function, which affects a person’s general ability to lead their normal life. *Kreiner v Fischer*, 471 Mich 109, 130; 683 NW2d 611 (2004); MCL 500.3135(7). To determine if an individual has suffered a “serious impairment of body function,” the effect of the impairment on the course of a plaintiff’s entire normal life must be considered. Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff’s normal life has not been affected, then the plaintiff’s “general ability” to lead his normal life has not been affected and he does not meet the “serious impairment of body function” threshold. *Id.* at 131.

Our Supreme Court developed a multi-step process to identify “whether a plaintiff who alleges a ‘serious impairment of body function’ as a result of a motor vehicle accident meets the statutory threshold for third-party tort recovery.” *Id.* “First, a court must determine that there is no factual dispute concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function.” *Id.* at 132.⁶ “Second, if a court can decide the issue as a matter of law, it must next determine if an ‘important body function’ of the plaintiff has been impaired.” *Id.* If a court finds that an important body function has been impaired, it must then determine if the impairment is objectively manifested. *Id.* “If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff’s general ability to lead his or her normal life.” *Id.* An objectively manifested impairment is a “medically identifiable injury or condition that has a physical basis.” *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002).

As previously discussed, the trial court found that plaintiff Stoner had not established an objectively manifested impairment as a result of the accident, while plaintiff Turk had not sustained any of her alleged injuries because of the accident, and ultimately concluded that “neither plaintiff suffered injuries that constituted a serious impairment of body function affecting her general ability to lead her normal life as required by statute,” and accordingly, granted defendant’s motion for summary disposition “as to each plaintiff.” We will assume, without deciding, that each plaintiff suffered objectively manifested impairments as a result of the accident. But even accepting that argument, we conclude, as defendant argues, that any such

⁶ If this is the case, then the trial court decides as a matter of law whether plaintiff suffered a serious impairment of a body function. MCL 500.3135(2)(a). Here, the parties do not dispute the fact that Turk suffered mild cervical and lumbar strains, as well as a contusion, a bulging disc and occasional hand numbness that possibly stems from a pinched nerve. Furthermore, the parties do not dispute that Stoner was diagnosed with a mild compression fracture immediately after the accident, and later attended physical therapy sessions for pain in her left shoulder and leg, as well as had surgery on her left shoulder and leg. Therefore, the trial court properly decided this issue as a matter of law. MCL 500.3135(2)(a).

impairment suffered by either plaintiff did not affect their general ability to lead their normal pre-accident life. Thus, summary disposition was properly granted. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) (Court of Appeals can affirm the trial court if it reached the right result, for the wrong reason).

As the trial court noted in its ruling on defendant's motion for summary disposition, plaintiffs had to establish that the impairments they suffered in the April 19, 2001, accident affected their ability to lead their normal life. In addressing this issue, the *Kreiner* Court noted:

In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his [or her] life. Merely 'any effect' on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his [or her] life." *Id.* at 132-133.]

The *Kreiner* Court went on to list five non-exclusive, non-exhaustive objective factors to assist a court in evaluating whether an impairment has affected a plaintiff's "general ability" to lead or conduct the course of his or her normal life: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Id.* at 133. The five factors are not intended to be individually dispositive, but rather are intended to serve as a framework to apply the totality of the circumstances to determine whether the plaintiff's impairments affect his or her general ability to conduct the course of his or her normal life. *Id.* at 133-134.

Here, viewing the evidence presented in a light most favorable to Turk, she established that as a result of her injuries, which for purposes of this discussion we will assume are attributable to the accident, she had to attend physical therapy sessions for six weeks, and now has trouble lifting heavy objects, traveling, vacuuming and gardening. However, Turk returned to her job as a night chef at Old Country Buffet a couple of days after the accident and stated that she still vacuums and gardens. Furthermore, Turk still takes long trips to the Upper Peninsula to visit her daughter, even more frequently than she did before the accident. Moreover, Turk resumed her daily walks with Stoner in January 2002, and stated that it does not bother her to walk. Finally, Turk has admittedly never been placed under physician-imposed restrictions regarding any of her daily or work related activities. Any post-accident restrictions regarding Turk's daily or work related activities are self-imposed. "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish" residual impairment. *Kreiner, supra* at 133 n 17. Therefore, even though some aspects of Turk's life were interrupted, the overall trajectory of her normal pre-accident life was not affected, and thus, we conclude that the evidence presented does not establish that Turk's injuries affected her general ability to lead her normal pre-accident life. Accordingly, we hold that Turk's injuries did not meet the "serious impairment of body function" threshold. *Id.* at 130-134.

Viewing the evidence presented in a light most favorable to Stoner, she established that as a result of her injuries, which for purposes of this discussion we likewise assume were attributable to the accident, she had surgery on her left knee and shoulder and attended physical therapy sessions for her left knee and shoulder before and after each of her respective surgeries. Stoner also established that it was too painful for her to return to her job as a sample display person at Meijer, and it was more difficult for her to iron, vacuum, grocery shop and do laundry after the accident. However, Stoner, who was 81 years old at the time of the accident, admitted that she had aches and pains before the accident, and that the discomfort in her left knee dated back to 1985. More importantly, Stoner resumed her daily walks with Turk in January 2002, and stated that even though it is more difficult to iron, vacuum, grocery shop and do laundry, she is still able to perform the aforementioned tasks as well as all of her other household tasks. Finally, Stoner has admittedly never been placed under physician-imposed restrictions regarding any of her daily or work related activities. Stoner's choice to quit her job at Meijer, as well as any delay in resuming her daily walks with Turk, were a result of self-imposed restrictions. As previously discussed, "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish" residual impairment. *Kreiner, supra* at 133 n 17. Therefore, even though some aspects of Stoner's life were interrupted, the overall trajectory of her normal pre-accident life was not affected, and thus, we conclude that the evidence presented does not establish that Stoner's injuries affected her general ability to lead her normal pre-accident life. Accordingly, we likewise hold that Stoner's injuries did not meet the "serious impairment of body function" threshold. *Id.* at 130-134.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray